**ONG AH BEE**

**v.**

**HII CHUNG SIONG, ROBIN**

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[SUIT NO. 36 OF 1991]
19 SEPTEMBER 1992

***LIMITATION: Claim based on negligence - Right to sue - When right accrued - Whether claim statute barred - Limitation Ordinance (Cap. 49).***

***EVIDENCE: Whether plaintiff bears the burden of proving that claim was brought within the limitation period.***

The plaintiff sued the defendant, his solicitor, claiming damages for negligence in the preparation of a sale and purchase agreement prepared by the defendant and entered into between the plaintiff and a housing developer for the purchase of a piece of property. It subsequently transpired that the property was not transferable as it was at all material times subject to a charge.

The defendant pleaded limitation in his defence in that the cause of action arose more than six years before the writ was filed and applied to strike out the plaintiff's claim. The Senior Assistant Registrar dismissed the defendant's application and the defendant appealed.

The questions before the Court where, when the right to sue accrued for the alleged negligence, namely when the plaintiff was said to suffer damage and whether the plaintiff had discharged the burden of proving that the claim was brought within the limitation period.

**Held:**

**[1]** The plaintiff suffered damage on the date of the execution of the Sale & Purchase Agreement, namely on 24 June 1985 and his right to sue accrued on that date. The writ was taken out on 18 September 1991 and the plaintiff had therefore exceeded the six years limit.

**[2]** The burden of proving the action was brought within the limitation period was on the plaintiff. The plaintiff's affidavit-in-opposition merely denied the defence of limitation which could not be considered as proving the issue.

*[Appeal allowed with costs to be taxed. Plaintiff's statement of claim struck out]*

**Cases referred to:**

*Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] QB 398; [1982] 3 All ER 961 ***(foll)***

*Cartledge v. E. Jopling & Sons Ltd.* [1963] 1 All ER 341 ***(foll)***

*Beckhouse v. Bonomi* [1861] 9 HL Cas 503 ***(refd)***

*Midland Bank Trust Co. Ltd. & Anor. v. Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571 ***(dist)***

*Dove v. Banhams Patent Locks Ltd.* [1983] 1 WLR 1436 ***(dist)***

*London Congregational Union Inc. v. Harris* [1985] 1 All ER 335 ***(dist)***

*Kensington & Chelsea & Westminster AHA v. Western Composites* [1985] 1 All ER 346 ***(dist)***

*Forster v. Outred & Co. (a firm)* [1982] 2 All ER 753 ***(foll)***

*Sykes v. Midland Bank Anor. & Trustees Co. Ltd.* [1969] 2 All ER 1238, [1969] 2 QB 518, on appeal [1970] 2 All ER 471. [1971] 1 QB 113 ***(foll)***

*Baker v. Ollard & Dentley* [1982] 126 SJ 593 ***(foll)***

**Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19, O. 56 r. 1

Limitation Ordinance (Sarawak) (Cap. 49) s. 3, Schedule - Part IV para 97.

*For the plaintiff - George Lau; M/s. Wong Ho Leng Advocates*

*For the defendant - Robin Hii Chung Siong in person*

**JUDGMENT**

**Steve Shim Lip Kiong J:**

On 27 March 1992, the defendant Robin Hii Chung Siong applied to the Senior Assistant Registrar to strike out the amended statement of claim under O. 18 r. 19. The application was dismissed with costs. The defendant has appealed against that decision under O. 56 r. 1.

It seems clear that the plaintiff's action is based essentially, if not solely, on a Sale and Purchase Agreement dated 24 June 1985 prepared by the defendant and entered into by the plaintiff with a developer called Sie Chung Tung Housing Development in respect of a piece of property described as sublot 38 comprised in Sibu Occupation Ticket nos. 35431 and 24012 together with 1 unit of reinforced concrete double-storey semi-detached dwelling house at the purchase price of RM140,000. On 18 September 1991, the plaintiff took out a writ of summons against the defendant for damages allegedly suffered by him as a result of the negligence of the defendant in preparing the aforesaid sale and purchase agreement. The defendant, in his amended statement of defence dated 19 February 1992, has pleaded specifically as follows:

> The alleged cause of action arose more than six(6) years before the commencement of this action and is accordingly barred by virtue of s. 3 and paragraph 97 of Part IV of the Schedule of Limitation Ordinance (Cap. 49).

Section 3 of the Limitation Ordinance (Cap. 49) states that every suit instituted after the period of limitation prescribed therefore by the Schedule, if limitation has been set up as a defence, shall be dismissed. As the defendant has pleaded limitation as a defence, he is entitled to seek to strike out the plaintiff's claim upon the ground that it is frivolous, vexatious and an abuse of the process of the Court; see per Donaldson, LJ in *Ronex Properties Ltd. v. John Laing Construction Ltd.* [1983] QB 398; [1982] 3 All ER 961.

Now it has been held that when the defence of limitation is raised, the burden of pleading and proving that the action was brought within the limitation period shifts to the plaintiff. In *Cartledge v. E. Jopling & Sons Ltd.* [1963] 1 All ER 341, Lord Pearce said:

> I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damage within the six years ... the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.

It should be noted that in the affidavit in support of the application before the Senior Assistant Registrar, the defendant has also invoked the defence of limitation in terms similar to that averred in the amended statement of defence, in particular paragraph 15 therein. In resisting the application, the plaintiff filed an affidavit-in-opposition through his solicitor Richard Wong Ho Leng stating that the action was instituted within the period of limitation. This had the affect of merely denying the defence of limitation. Such a bare denial could hardly be considered as proving the issue. It would have gone against the principle propagated by Lord Pearce in *Cartledge* that the onus was on the plaintiff to prove that his cause of action accrued within the statutory period once the defendant had raised the defence of limitation. Here, it would appear that the Senior Assistant Registrar had accepted the denial of the plaintiff as sufficient to rebut the defendant's allegation because, according to him, the issue relating to the commencement of the limitation period, was a question of fact which could only be determined at the trial by calling witnesses. But I think the matter could be appropriately resolved by a detailed examination of the writ, the statements of claim and defence as well as the affidavits relevant thereto.

Undoubtedly, this action involves a case of negligence and therefore falls under item 97 of the Schedule to the Limitation Ordinance (Cap. 49) in which the limitation period is 6 years from the accrual of the right to sue. It has been said that in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage; see *Beckhouse v. Bonomi* [1861] 9 HL Cas 503; *Midland Bank Trust Co. Ltd. & Anor. v. Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571. In the present case, the plaintiff's claim accrued only when the damage was suffered by him as a result of the defendant's alleged negligence. The question then is to determine when the plaintiff was said to suffer damage.

Mr. George Lau for the plaintiff submitted that the damage was suffered by the plaintiff on 24 September 1985 when the developer Sie Chung Tung Housing Development refused and or failed to deliver the property to the plaintiff under the Sale and Purchase Agreement. He apparently relied on the authority of *Midland Bank Trust Co. Ltd. Supra.* That case involved an agreement drawn up by a solicitor embodying an option given by one party to the other (the plaintiff) to purchase a freehold reversion for a stated price at anytime during a fixed period but the solicitor who was given custody of the option was alleged to have been negligent in failing to register the said option under the Land Charges Act 1925. In my view, the facts are clearly distinguishable from the present case. The same must be said of the other cases cited by Mr. Lau, namely, *Dove v. Banhams Patent Locks Ltd.* [1983] 1 WLR 1436; *London Congregational Union Inc. v. Harris* [1985] 1 All ER 335 and *Kensington & Chelsea & Westminster AHA v. Western Composites* [1985] 1 All ER 346. These cases are concerned essentially with damage arising from construction defects, etc, in buildings which Dunn LJ. appropriately referred to in *Forster v. Outred &*

*Co. (a firm)* [1982] 2 All ER 753 as "cases on physical and material damage" quite different from those giving rise to economic losses.

In *Forster*, solicitors had negligently allowed their client to mortgage her property as security for a loan for her son and the Court of Appeal held that the client suffered damage when the security was entered into and not when the creditor enforced the security. Therein, Stephenson LJ., who presided over the appeal, after reviewing the relevant case authorities cited before him came to this conclusion:

> I would accept counsel for the defendant's statement of the law and would conclude that on the facts of this case, the plaintiff has suffered actual damage through the negligence of her solicitors by entering into the mortgage deed, the effect of which has been to incumber her interest in her freehold estate with this legal charge and subject her to a liability which may, according to matters completely outside her control, mature into financial loss, as indeed it did ...

And Dunn LJ. in the same case questioned the validity of plaintiff's Counsel's contention that since the plaintiff, by the express terms of the mortgage, was under no liability to the mortgagees for repayment of her son's overdraft and the mortgagees could not exercise their power of sale of the mortgaged property, there was therefore no damage suffered by the plaintiff until a demand had been made under the mortgage. His Lordship was however of the view that as soon as the plaintiff executed the mortgage, she became liable under its express terms; that the cause of action was complete when she executed the mortgage. In coming to this decision, he cited with approval *Sykes v. Midland Bank Anor.. & Trustees Co. Ltd.* [1969] 2 All ER 1238, [1969] 2 QB 518, on appeal [1970] 2 All ER 471. [1971] 1 QB 113 where it was held that damage crystallised when the plaintiff, in reliance of the negligent advice, executed the lease.

It is perhaps interesting to note that *Forster* was relied upon some two months later by the Court of Appeal in *Baker v. Ollard & Dentley* [1982] 126 SJ 593 where the brief facts are that on 12 April 1973, the first defendants who were solicitors procured the conveyance of a house to the plaintiff and to Mr. & Mrs. B on trust for sale and to hold the net proceeds in trust for themselves as tenants in common in the shares of 49 percent to the plaintiff and 51 percent to Mr. & Mrs. B. The plaintiff thereafter occupied the first floor of the house and Mr. & Mrs. B the ground floor. In December 1973 Mr. & Mrs. B began proceedings for an order for sale of the house with vacant possession which were compromised by an agreement on 16 October 1975 whereby the first floor became vested in the plaintiff and the ground floor in Mr. & Mrs. B in fee simple. On 16 April 1981, the plaintiff issued a writ alleging negligence and claiming that she first suffered damage on 16 October 1975 when she entered into the agreement to give her the security of the occupation of the first floor which the first defendants ought to have achieved in 1973 but which resulted in a depreciation in the value of her interest in the house. The first defendant applied to strike out the writ and statement of claim on the ground that the cause of action was statute-barred. The Judge refused to strike out because he was unclear whether the pleaded events were events which gave rise to a cause of action in negligence or events which merely had to be taken into account in assessing the quantum of damages. The first defendant appealed.

In allowing the appeal, Templeman LJ. said that the action was time barred if the plaintiff first suffered damage on 12 April 1973, the date of the conveyance and not on 16 October 1975 ... that on 12 April 1973, the plaintiff did not receive that which the solicitors ought to have obtained for her and she, therefore, suffered damage on that date; that the plaintiff suffered damage at the date of the conveyance and as form that date, her cause of action against the solicitors was complete.

In the instant case, the plaintiff had executed the Sale and Purchase Agreement prepared by the defendant. He wanted to purchase a piece of land together with a dwelling house from the developer Sie Chung Tung Housing Development. He never got it because the said property was not transferable, as it was, at all material times, charged to Kong Ming Bank Berhad and Kong Ming Finance Corporation Berhad. It was also caveated by one Yii Ha Hiong. In the words of Templeman LJ. in *Baker v. Ollard & Dentley*, "the plaintiff did not receive that which the defendant ought to have obtained for him and he therefore suffered damage on that date." Quite evidently, this would be on the date in which the plaintiff executed the Sale and Purchase Agreement on 24 June 1985

which appeared to have been done contemporaneously with the preparation of the document in question. The plaintiff had alleged that the defendant was negligent in preparing it. On that basis, it could be said that there was a distinct disadvantage suffered by the plaintiff as a result of the alleged negligent act of the defendant from the moment of execution of the said Sale and Purchase Agreement on 24 June 1985. It should be noted that the plaintiff had claimed losses amounting to (a) RM140,000 being the purchase price of the property he had lost and (b) RM40,000 agreed liquidated damages. In the circumstances, the plaintiff's right to sue accrued on 24 June 1985. Since the plaintiff took out the writ on 18 September 1991, he had therefore exceeded the 6 years limit. He had brought this action more than 6 years after the accrual of his right to sue and therefore he would be barred by virtue of s. 3 and paragraph 97 of Part IV of the Schedule to the Limitation Ordinance (Cap. 49).

For the reasons given, I will allow the appeal and strike out the amended statement of claim on the ground that it is frivolous, vexatious and an abuse of the process of the Court. Cost to the defendant to be taxed.

**PUBLIC PROSECUTOR**

**v.**

**MOGAN A/L MARUTHAMUTHU**

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B.
HJ. ISHAK JC
[PERAK CRIMINAL TRIAL
NO. 58-3-92 (88)
5 DECEMBER 1992

***DANGEROUS DRUGS: Trafficking in dangerous drugs - Cannabis - Presumption - Section 37(da)(vi) Dangerous Drugs Act 1952 - Definition of cannabis - Agent provocateur - Whether same as accomplice - Agents for prosecution - Section 40A Dangerous Drugs Act 1952 - Whether evidence of agent provocateur needs corroboration - Defence was a bare denial - Whether sufficient to rebut presumption - Discrepancies and inconsistencies in some prosecution witnesses - Whether sufficient to reject the whole of the evidence.***

***CRIMINAL PROCEDURE: Application by defence Counsel to recall prosecution witness at close of defence case - Section 425 Criminal Procedure Code - Discretion of Court - Whether new evidence essential to just decision of case - Prosecution witness not cross-examined on allegation of assault and coercion to admit ownership of incriminating exhibits - Effect of failure to cross-examine - Demeanour of Accused - Section 271 Criminal Procedure Code - Remarks as to demeanour of witness.***

The Accused was charged for an offence of trafficking in dangerous drgus, to wit, cannabis weighing 729.51 grammes on 20 July 1988 at about 11.20 a.m. in the vicinity of Jalan Ulu Tupai, Taiping, Perak, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s. 39B(2) of the same Act. At the end of the defence case, the Accused was found guilty, convicted and sentenced to death for the offence for which he was charged.

**Held:**

**[1]** Generally, the Court is always wary of the evidence of an agent provocateur. But, in this case, by virtue of s. 40A of the Dangerous Drugs Act 1952, the evidence of an agent provocateur needs no corroboration to make a finding by the trial Court.

**[2]** Having seen and heard the Accused and considered his defence as a whole, the Accused's version cannot be believed and it was merely a denial.